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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

HORNBROOK COMMUNITY SERVICES DISTRICT, Plaintiff and Respondent, v. KIMBERLY R. OLSON et al., Defendant and Appellant.	C080261 (Super. Ct. No. SCSCCVCV140000797)

Plaintiff Hornbrook Community Services District (the District), a public community services district which provides household water service to customers within its boundaries, brought this action against defendants Kimberly R. Olson, a member of the District's Board of Directors (the Board), and Peter T. Harrell, who had performed work as the District's volunteer general manager. The District asserts five causes of action. Defendants each filed special motions to strike the second amended complaint

pursuant to Code of Civil Procedure section 425.16,[1] and each defendant joined in the other's special motion to strike. The trial court denied both motions in their entirety.

Defendants jointly appeal. Defendants raise a number of issues in their briefs under separate headings, including that the trial court failed to properly analyze the pleadings, the trial court erred in denying their special motions to strike, and additional error. Defendants set forth a number of arguments in subheadings under each of these categories, including a number of ways in which the trial court allegedly erred in considering their special motions to strike. Ultimately, however, based on defendants' arguments, the content of the judgment (order) appealed from, and the issues properly before us on this appeal, we must determine whether the trial court properly denied defendants' special motions to strike based on the applicable two-step analysis. We conclude that it did.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Second Amended Complaint

The second amended complaint is the operative complaint. It asserted five causes of action against Olson and Harrell.

First Cause of Action—Conversion

In the first cause of action, to recover damages for conversion, the District stated that it deposited $61,555.08 into four accounts at Tri-Counties Bank in Yreka. On or about June 25, 2014, without authorization from the Board, Olson caused the bank to deliver to her four checks totaling $61,555.08 and caused the District's four accounts to be closed. The District further alleged that Olson took those funds into her personal possession and converted them to her own use, depriving the District of those funds. The

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[1] Further undesignated statutory references are to the Code of Civil Procedure.

District demanded the immediate return of the funds, but Olson refused and instead sent the funds out of state. The District asserted that Olson delivered the checks to the trial court only after being repeatedly ordered to do so and being threatened with contempt. The District also alleged that defendants had possession of certain personal property owned by the District, and, despite the District's demands, they refused to return the personal property; thus, defendants also converted the personal property to their own use. Additionally, the District asserted that defendants' failure to return the funds and the personal property constituted a violation of California's False Claims Act (Gov. Code, § 12650 et seq.), and therefore defendants were jointly and severally liable for treble damages (see Gov. Code, § 12651).

Second Cause of Action—Injunctive Relief/Possession of District Property

In the second cause of action, seeking preliminary and permanent injunctive relief, the District reasserted the factual allegations set forth in the first cause of action, and further asserted that, unless restrained, defendants would continue to perpetrate wrongful acts and omissions causing the District irreparable damages. The District sought preliminary and permanent injunctions prohibiting defendants from "taking and/or maintaining unauthorized possession of property of the" District.

Third Cause of Action—Injunctive Relief/False Representations

In the third cause of action, for preliminary and permanent injunctive relief, the District stated that, on or about June 18, 2014, the Board dismissed Olson as secretary of the District and Patricia Brown, a member of the Board, was appointed to succeed Olson as secretary. At the same time, Harrell was dismissed as the District's volunteer general manager and someone else "was subsequently appointed to assume the same or similar duties." The District asserted that, notwithstanding their dismissals, defendants continued to represent themselves as holding their positions with the District, and they attempted to exercise the authority of their former positions. Additionally, purporting to act in his position as general manager, Harrell had trespassed on District property,

changed locks, and undertaken other unauthorized acts. Therefore, the District asserted that defendants had interfered with District functions and caused the District damages. The District asserted that, unless defendants were restrained, they would continue to do so. The District requested preliminary and permanent injunctive relief, enjoining defendants from making representations to third parties that they held positions or offices with the District, and from exercising or attempting to exercise the authority of such offices, with the exception that Olson could continue to represent that she was a member of the Board as long as she continued to occupy that position. The District also sought preliminary and permanent relief specifically enjoining Harrell from entering on District property, changing locks on District property, and modifying or removing personal property.

Fourth Cause of Action—Injunctive Relief/Trespass to Personal Property

In the fourth cause of action, for preliminary and permanent injunctive relief, asserted only against Olson, the District asserted that, on two occasions, Olson defaced official and legally required notices of Board meetings. The District asserted that, unless restrained, Olson would continue to take such action. Therefore, the District requested preliminary and permanent injunctive relief, enjoining Olson from defacing, writing on, removing, damaging, or covering District notices.

Fifth Cause of Action—Breach of Fiduciary Duty

In the fifth cause of action, to recover damages for breach of fiduciary duty, also asserted only against Olson, the District asserted that, as a Board member, Olson owed a fiduciary duty to the District. Olson breached this fiduciary duty "by providing assistance to . . . Harrell with a false and fraudulent claim he made, and a lawsuit he filed thereon, against the District, seeking unpaid wages." (Capitalization omitted.) The District asserted that Harrell's claim was determined to be meritless by the California Labor Commissioner (Labor Commissioner) on the ground that Harrell was found not to

have been employed by the District during the relevant time period. The District sought damages in an amount to be proven at trial.

Olson's Special Motions to Strike[2]

Olson filed a special motion to strike the second amended complaint pursuant to section 425.16. Olson asserted that the action arose out of her acts in furtherance of her constitutional rights of petition and free speech, in both her individual and official capacities and the District could not establish a probability of prevailing on its claims against her.

With regard to the checks that are the subject of the first cause of action, Olson asserted that, when she learned from the bank that the accounts were to be closed, as secretary and a signatory on the bank accounts, she performed her duty as secretary under the District bylaws and collected cashier's checks which were made out to the District. According to Olson, upon learning of this action, the District attempted to have her arrested and commenced this action. Olson asserted that it was reasonable to conclude that the District commenced this action for an improper purpose, in bad faith, and in retaliation for her exercise of her rights to petition and free speech. Olson further asserted that adverse actions against her taken by the District, including purporting to eliminate her position as secretary, disenfranchising her by purporting to revoke the bylaws, and filing this action, were undertaken within less than a month of defendants' filing of lawsuits against the District and three Board members alleging violations of state law and District bylaws. According to Olson, this timeline established a prima facie case of retaliatory adverse employment action in violation of, among other things, the rights of

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2 Both defendants also filed conventional motions to strike portions of the second amended complaint. The trial court granted these motions only insofar as they sought to strike portions of the second amended complaint as to attorney fees. The trial court otherwise denied the motions to strike. It is not necessary to further discuss these motions.

petition and free speech. Olson essentially asserted that her removal as secretary was illegitimate and unauthorized. According to Olson, the District acted "arbitrarily, capriciously, and in retaliation for [d]efendants' communication (and Olson's assistance to Co-Defendant Harrell in making out his communications) to the . . . Board, the Labor Commissioner, CalOSHA, and other agencies about improper, illegal, unsafe, improper conduct committed by the [District], and/or the three Board members who now claim to be acting on its behalf herein."[3] (Italics & fn. omitted.) Therefore, before addressing each cause of action individually, Olson asserted that the entire action was subject to a section 425.16 special motion to strike. Olson asserted that defendants' acts alleged in the second amended complaint arose from protected speech and conduct related to ongoing legal and administrative proceedings.

Turning to the individual causes of action, Olson asserted that the alleged conversion related to her right to petition and free speech and thus arose from protected activity because the first cause of action alleged that communications between her and the bank concerning ongoing litigation involving the parties caused the bank to close the District's accounts and deliver the checks to Olson. Olson asserted that the allegations "are evidence that actions taken by the [District] were taken in response to Olson's acts of petition to the . . . Board, the Department of Health, the Department of Labor" (fns. omitted), and the trial court.

Olson further asserted that the District could not demonstrate the probability of prevailing on its claim. With regard to the District's purported demand for the return of the funds, Olson asserted that the second amended complaint contained no specific factual allegations relating to official actions properly taken by the District to make such

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[3] Here, Olson devoted a significant portion of her memorandum of points and authorities to the showing necessary to establish a wrongful termination claim, to be distinguished from the showing necessary to prevail on her section 425.16 special motion to strike.

a demand, or the authority to make such a demand. Therefore, according to Olson, the second amended complaint failed to state sufficient facts to establish the conversion cause of action, and thus the District could not demonstrate the probability of prevailing on the merits. With regard to the allegations that defendants had converted personal property, Olson asserted that the second amended complaint failed to plead sufficient facts in support, and therefore the District could not prevail on the claim. Olson asserted that "mere passive possession, without more, is not conversion," and further asserted that the District had failed to plead that defendants acted willfully in allegedly converting the personal property, that the alleged conversion caused damages, and that defendants acted without lawful justification.

Olson asserted that the second cause of action, which incorporated the allegations of the first cause of action, was deficient for the same reasons. Olson asserted that the District failed "to identify what intentional tort they are seeking relief for in their second cause of action and it is impossible from the allegations to determine what the tort is." (Fn. omitted.) Olson asserted that the second cause of action failed to allege "proper facts" and to identify admissible evidence to support a claim for injunctive relief.

Olson asserted that the District in the third cause of action again failed to identify the intentional tort for which it sought redress and failed to plead damages. Furthermore, according to Olson, the third cause of action sought an impermissible prior restraint of speech. Olson emphasized that defendants' representations concerning their offices were the subject of ongoing litigation. Olson further asserted that the allegations of defendants' representations that were the subject of the third cause of action were not made with particularity as to what representations were actually made and to whom, or how such representations may have interfered with District functions. In connection with this assertion, Olson contended, "Olson, appointed on January 14, 2014 as Secretary for a term of one year pursuant to the [District] Bylaws and [Government] Code [section] 61043(a), cannot ex post facto be nullified from that position by the ultra vires acts of the

[Board],[4] and cannot be legitimately silenced by the [District] by doing so, regardless." (Underscoring & italics omitted.) Olson further asserted that, insofar as her representations concerning her office were in support of actions before a proceeding authorized by law, they arose out of protected activity and were absolutely privileged under Civil Code section 47.

Olson asserted that the allegations in the fourth cause of action arose from her acts in furtherance of her right of petition, and her right to speak out about a public issue which was under consideration by a public agency. According to Olson, this cause of action seeking to prevent her from writing on District notices posted on public bulletin boards constituted a prior restraint of her free speech. Olson asserted that her actions as alleged by the District were taken in her official capacity as secretary, and were in conformance with the bylaws and the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) (the Brown Act). Olson claimed that the notices themselves were in violation of District bylaws and the Brown Act. She further asserted that her "messages" came within the ambit of section 425.16, subdivision (e)(2) and (3). Olson asserted that, as a public officer writing on public notices in a public place under color of her authority as secretary, her actions were protected speech, in both her official and individual capacities, and were privileged under Civil Code section 47.[5]

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[4] The text here actually reads "Defendants" rather than "Board," perhaps because this language was borrowed from papers in one of the lawsuits filed by defendants against the District and the three Board members. We presume that here Olson intended to refer to ultra vires acts committed by the Board rather than by Olson and Harrell.

[5] In making these claims, Olson again delves into the substance of her contention that she was improperly, and not effectively, dismissed as secretary, an issue she finds to be inextricably intertwined with the allegations of the second amended complaint and her special motion to strike. Indeed, defendants devote substantial portions of their briefing, and their motion papers before the trial court, to such issues and others not strictly relevant to a special motion to strike. Many of these issues would be more appropriately addressed either at trial or, prior thereto, on a motion for judgment on the pleadings (see

Olson noted that the fifth cause of action "specifically asserts that it is brought against Olson for participation in Harrell's administrative proceedings before the Labor Commissioner, and actions before the Courts; thus, the fifth cause of action is also barred by Civil Code section 47, in addition to being a SLAPP." (Underscoring & capitalization omitted.) Olson asserted that communications made in preparation for or anticipation of litigation or any official proceeding fell within the ambit of section 425.16, subdivision (e)(1) and (2).

Olson asserted that the District could not prevail on any of its causes of action insofar as asserted against her because she was immune from suit as a Board member and/or secretary pursuant to Government Code section 820.2. She asserted that each act allegedly undertaken by her was done in her official capacity during the performance of a discretionary duty. She further asserted legislative immunity, immunity in instituting or prosecuting a judicial or administrative proceeding (Gov. Code, § 821.6), and immunity pursuant to section 822.2, asserting that the allegations of the second amended complaint did not include allegations of actual malice.

Olson's Declaration in Support

Olson stated that she had been appointed to the Board on January 14, 2014. According to Olson, under the then-effective bylaws, adopted April 18, 2014, she was to serve as secretary for the term of one year. Olson maintained that "all actions I may have

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§ 438) or a motion for summary judgment (see § 437c). Our resolution of defendants' appeals from the trial court's denial of their special motions to strike, as set forth extensively *post*, is concerned with whether the conduct complained of " 'arises from activity protected by section 425.16,' " and, if so, whether the District demonstrated a probability of prevailing on the merits of its claims. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*); *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1161-1162 (*Sheley*).) To the extent that defendants' arguments are not relevant to these determinations, and to the extent that they are relevant to the second step of the analysis on a cause of action about which we conclude that defendants failed to satisfy their required first-step showing, we do not address them here.

taken relating to any allegations contained in the Second[] Amended Complaint . . . were undertaken by me in reasonable reliance upon the provisions of the [District] Bylaws, my authority as a Director and the Secretary of the [District], the rule of law, and the expectation of good faith and fair dealing from my fellow Board members."

Olson alleged that the District "is actually a cabal" consisting of three members, Michele Hanson, Patricia Brown, and Sharrel Barnes. Olson stated that she and Harrell had both filed lawsuits against these Board members alleging violations of state and local law. Olson stated that she had assisted Harrell in collecting evidence and preparing reports related to alleged OSHA violations, a complaint filed with the Department of Fair Employment and Housing, a discrimination complaint filed with the Equal Employment Opportunity Commission, and a complaint alleging Labor Code violations with the Labor Commissioner. Olson further asserted that she had documented Brown Act violations and violations of the District bylaws by Hanson and Brown. Olson asserted that, confronted with these allegations, the District "continues to take action calculated to act against me, and thwart my reports of wrongdoing by it to proper authorities."

Olson asserted that Hanson, Brown, and Barnes held a meeting on June 18, 2014, in violation of the Brown Act, at which they acted ultra vires, violated the existing bylaws, and violated the Government Code by purporting to rescind the April 18, 2014, bylaws. Days later, Olson filed a complaint against Hanson with the California Fair Political Practices Commission. According to Olson, Hanson's reappointment of herself as president, Barnes as vice president, and the appointment of Brown as secretary "demonstrate that these (illegal and improper) acts were performed simply to remove me from my position as an Officer, rather than simply to eliminate the Officer position itself (or for any other legitimate considerations)."

Olson further alleged that, at a June 25, 2014, meeting, held in violation of the Brown Act and District bylaws, Hanson, Brown, and Barnes acted ultra vires and in violation of the bylaws in purporting to rescind Olson's banking signature authority.

Olson believed that they took this action to retaliate against her for her actions in filing complaints.

Olson acknowledged that she had collected the cashier's checks that were the subject of the first cause of action. She asserted that she was not removed as a signatory to the account until after she collected the checks, and further asserted that, "even if the actions taken by Hanson and the others are assumed to be legal and effective, their acts were still accomplished after the event they are attempting to sue me for. . . ."

Olson denied that the District or any of the Board members ever demanded the return of personal property. Olson asserted that, even if a Board member had made such a demand, it would have been an ultra vires act because individual Board members lack authority to act on behalf of the District, and, instead, action must be taken by the District as a body by motion, resolution, or ordinance passed at a properly noticed public meeting.

Olson asserted that the allegations that Harrell trespassed on District property and cut locks were false because, at the relevant times, she and Harrell entered District facilities using District keys. Olson further asserted that Harrell was not in possession of tools or other items belonging to the District. Olson asserted that the items of personal property allegedly in defendants' possession were actually at the District water plant or at Hanson's home. Olson asserted that "these false claims are additional evidence this action is brought in bad faith, and for the purpose of retaliating against me for my filing of complaints and legal actions against Hanson and her two friends on the Board."

With regard to the alleged defacement of public notices, Olson asserted that the notices were posted on private property at locations freely accessible by the public. Olson asserted that none of the notices were posted on property owned or maintained by the District. According to Olson, there are no restrictions placed upon the writing on documents posted on the public bulletin boards by the bulletin board owners. Olson claimed that she wrote on the notices in her official capacity as secretary.

Harrell's Special Motion to Strike[6]

On the same day Olson filed her special motion to strike, Harrell filed his own special motion to strike. Harrell incorporated the points and authorities in Olson's motion and relied on the same arguments. Harrell further asserted that he did not possess any District personal property.

In his declaration in support, Harrell asserted that he did not trespass on District property or destroy District locks, alleged that the Board participated in numerous violations of law, denied that he retained any District personal property, and asserted that the action against him was motivated by a desire to retaliate against him for his filing of complaints.

The District's Opposition to Olson's Motion[7]

With regard to the first cause of action, the District asserted that the conversion of funds, the conversion of personal property, and a False Claims Act claim are neither protected speech nor pertain to the right to petition. The District asserted that it was not Olson's words or actions which caused the bank to close the District's accounts and deliver the funds to her which formed the gravamen of the first cause of action. The District further asserted that it was immaterial whether Olson initially had the authority to take possession of the funds. Instead, it was the wrongful retention of the funds following demand which was actionable as conversion. The District asserted that the same argument applied to the personal property. Furthermore, the District asserted that, even if Olson's alleged actions could be deemed speech, it had demonstrated a

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6 Olson filed for joinder in Harrell's special motion to strike, and Harrell filed for joinder in Olson's special motion to strike.

7 The District also filed opposition to Harrell's special motion to strike, in which it incorporated its opposition to Olson's special motion to strike and all papers submitted in support of that opposition.

probability of prevailing on the merits because Olson's declarations demonstrated that she committed the acts alleged.

The District asserted that the second cause of action was not truly a separate cause of action, but instead was a request for an additional remedy. Because the first and second causes of action were premised on the same facts and circumstances, the District asserted that, assuming the special motion to strike was denied as to the first cause of action, it also must be denied as to the second.

The District asserted that the allegations in the third cause of action sufficiently stated a cause of action for intentional misrepresentation and sought an injunction against defendants making such representations and, as to Harrell, entering on District property. Addressing defendant's contention that the third cause of action sought an impermissible prior restraint of speech, the District asserted that Olson's conduct constituted a violation of Penal Code section 529, which prohibits false personation of a public official. The District asserted that Olson had been removed as secretary and that defendants' claim that they still occupied their former offices depended on their attempt to have all Board actions since June 2014 nullified. However, the District asserted that this issue need not be resolved at this stage. Instead, the District asserted, all that was required for the denial of Olson's motion was for it to offer evidence which, if credited, would support its allegations that defendants had represented themselves to be officers at a time when they were not which, the District further asserted, it had done through Hanson's declaration, discussed *post*. Additionally, the District noted that, while Olson asserted that, once she was elected, the Board was powerless to remove her for one year, that term had expired and Olson had still not returned District personal property. The District further asserted that, under Government Code section 61050 et seq., there is not a specific reference to the office of secretary, but the offices of general manager and District treasurer serve at the pleasure of the Board. The District asserted that it would be illogical to conclude that,

while those offices serve at the pleasure of the Board, the Board was powerless to remove a secretary.

With regard to the fourth cause of action, the District asserted that the court had already denied Olson's special motion to strike a corresponding cause of action in the first amended complaint. According to the District, the court rejected Olson's contention that the speech she purportedly exercised in defacing District notices was protected because the notices were District property. Thus, the court concluded that Olson did not have immunity for her actions. Therefore, according to the District, Olson's motion insofar as directed at the fourth cause of action was actually, in effect, a motion for reconsideration. The District maintained that there were no grounds for reconsideration, the court lacked jurisdiction to decide this part of the motion, and that this part of the motion was, therefore, frivolous and Olson should be sanctioned.

As to the fifth cause of action, the District asserted that its allegations were not based on Olson's testimony in support of Harrell. Instead, the fifth cause of action was based on her use of her purported office and her access to District property and records to benefit and support Harrell in his claim. The District asserted that, while the litigation privilege may protect speech, it does not supersede the prohibition against a public official misusing the office, authority, and assets for the benefit of herself or family members.[8] The District asserted that the allegations of the fifth cause of action were sufficient, and it had evidence to support it.

Hanson Declaration

With its opposition papers, the District submitted a declaration completed by Hanson, President of the District. Hanson stated that Harrell had never been an employee of the District, and that he was not an officer or director of the District. Harrell did act as

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[8] In referencing family members, the District appeared to be alluding to defendants' status as former spouses.

a community volunteer as its acting general manager, but only until approximately June 18, 2014. According to Hanson, the Labor Commissioner confirmed Harrell's non-employee status in an adjudication on December 18, 2014.[9] Hanson stated that Olson was a member of the Board, and that, until approximately June 25, 2014, she served as secretary.

According to Hanson, until June 2014, the District operated under one or more sets of bylaws prepared by Harrell, who was not an attorney or otherwise qualified to prepare such documents. Upon realizing that the bylaws were inadequate, the Board, at a special meeting on June 18, 2014, rescinded the resolution which had adopted those bylaws. According to Hanson, that meeting was called and held in compliance with the former but then-effective bylaws.[10] Subsequently, the Board adopted restated bylaws, most recently in September 2014.

Hanson stated that, on or about June 25, 2014, Olson took possession of four cashier's checks in the amounts of $10,560.79, $37,093.52, $3,900.00, and $10,000.77 and refused to surrender them for deposit and use by the District. Instead, according to Hanson, Olson sent the checks out of state, which Olson acknowledged in open court. According to Hanson, Olson only surrendered the checks following repeated demands by the court and under threat of contempt.

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[9] The District submitted the December 18, 2014, order, decision or award of the Labor Commissioner. Harrell had sought wages from March 9, 2014, through November 30, 2014. The decision notes that Olson was a witness for Harrell. The Labor Commissioner concluded that Harrell was a volunteer rather than an employee, there was no employment relationship and therefore the Labor Commissioner lacked jurisdiction over the claim, and Harrell was "due nothing on his claim for wages or expenses."

[10] The record contains a copy of an agenda for the June 18, 2014, special meeting. New business included the discussion and possible action concerning the prior adoption of bylaws. The minutes of that meeting, also in the record, indicate that previously adopted bylaws were revoked. The resolution rescinding a prior resolution adopting bylaws on April 18, 2014, was passed, and also appears in the record.

Hanson alleged that the District allowed defendants to take personal property owned by the District to Olson's home. After identifying a number of specific items of District personal property, Hanson stated that, while she did not know the whereabouts of the property last known to be in defendants' possession, based on conversations with the District's other officers and employees, Hanson did not believe that defendants had returned any of the personal property. Hanson stated that, on or about June 26, 2014, and on several occasions since then, she had submitted written and verbal demands that defendants return the personal property, but defendants had ignored her requests. Hanson asserted that replacement of the personal property would cost thousands of dollars.

Hanson stated that, despite having been removed as secretary and having a replacement appointed on June 25, 2014, Olson continued to represent herself as holding that office. Hanson asserted that, despite protest from the Board, Olson had purported to act as secretary by certifying District records, testifying in court and administrative proceedings, directing District employees, and corresponding with governmental agencies. Hanson stated that the most recent misrepresentation of which she was aware occurred on March 3, 2015, when Olson represented herself as secretary to the Siskiyou county clerk, causing the clerk to send Olson District election materials. Hanson asserted that Olson's misrepresentations had caused the District to incur significant unnecessary expenses, and had sowed confusion. Hanson believed that, unless enjoined, Olson would continue to make such false representations, as she had maintained for the prior nine months that she had the legal right to represent herself as District secretary.

Hanson alleged that Harrell had similarly misrepresented himself as being acting general manager after he was removed from that position. According to Hanson, Harrell had given instructions to District employees, including Clint Dingman, giving them the false impression that he had authority imparted by the District and that he spoke for the District. Hanson further alleged that Harrell had entered onto District property and had changed locks, removed water meters, and taken other unauthorized actions.

With regard to Olson's defacing District notices, Hanson asserted that, by law, the District was required to post notices of Board meetings and agendas. According to Hanson, when the District did so on June 12, and June 17, 2014, Olson defaced the notices with a marker, writing on the notices "illegal meeting canceled" or words to that effect.[11] According to Hanson, Olson's actions were undertaken without any authorization from the District or its officers.

As to the fifth cause of action alleging Olson breached her fiduciary duty, Hanson stated that Olson had worked closely with Harrell in his wage claim against the District. Olson furnished Harrell with District records and falsely certified records in her purported capacity as secretary. Hanson stated that she was present at the proceeding before the Labor Commissioner when those records, which the District had not had access to since Olson was replaced as secretary, were authenticated by Olson and offered into evidence in support of Harrell's claim. Hanson asserted that, because Olson had possession and control of District personal property, including office equipment, it was reasonable to infer that Olson used that property in furtherance of Harrell's claims against the District. This had caused the District to incur legal expenses.

Hanson also stated that at no time had she, as a Board member and as president, knowingly violated the Brown Act. Hanson asserted that all Board meetings were duly noticed and posted, and that notice had been given to all Board members of special meetings, but Olson had refused to attend the special meetings. Hanson stated that, "Because of that, and out of an abundance of caution, at a regular meeting held on

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[11] The record contains copies of two notices, one for a special Board meeting on June 13, 2014, and one for a special Board meeting on June 18, 2014. Across the first is written, in large handwriting, "CANCELLED DUE TO BROWN ACT [AND] HCSD BYLAWS VIOLATIONS" and appears to be signed by Olson, purportedly as secretary, on June 12, 2014. Across the second, which is signed by Olson purportedly as secretary on June 17, 2014, is written: "THIS MEETING IS IN VIOLATION OF THE BROWN ACT AND HCSD BYLAWS, AND SO IS ILLEGAL!"

October 1, 2014, the Board ratified all actions it had previously taken at special meetings, thereby correcting any procedural deficiencies."

Trial Court's Order Denying Special Motions to Strike

The trial court denied defendants' special motions to strike. It determined that none of the allegations concerning Olson's activities arose from protected activity. The court found, based on Olson's declaration, that all of her actions "occurred outside of any legislative hearing or proceeding." The court further found that Olson acknowledged she took the checks, she implied she had the personal property, and she admitted defacing the District's meeting notices. The court reasoned that none of these were legislative acts, none constituted speech made in the course of a legislative proceeding, and it would be unreasonable to characterize these acts as petitioning a legislative body. The court ruled that, because none of the acts complained of constituted protected acts, Olson failed to make her threshold showing on her special motion to strike.

The trial court further concluded that, inasmuch as Olson asserted that the Board's actions were ultra vires and that she was acting under color of law, she still did not make a threshold showing of protected activity because the evidence showed that Olson knew there were Board meetings on June 18 and 25, 2014, and she declined to participate. The court found that there was no Brown Act violation as to the June 25, 2014, meeting, as Olson was afforded more than 24 hours' notice of the meeting.

The trial court further stated that, to the extent that Olson "claims any protection that derives from her membership" on the Board, a legislative body, she had the opportunity to participate and vote in the legislative forum but declined to do so. Olson did not attend meetings on June 18 or 25, 2014, despite having notice of those meetings. According to the trial court, by declining to take action in the legislative body, "she cannot claim protection either of her acts or her speech."

Addressing the Board's authority to rescind and replace its bylaws, the trial court stated: "To the extent [d]efendant Olson claims that the By Laws of 4-18-14 were non-

modifiable by the District Board, the court notes that the language in the cited Section A.9 and Title 1 of those By Laws appears to be protective of the interests of the ratepayers of the district but is precatory only, in that no law requires it. Government Code Section 61040 and 61045 give broad authority to the Directors of a Community Service District to craft their governing documents. The District's ratepayers' interests are already protected by the provisions of California Constitution Article 13D Section 6 and Government Code 53755 regarding voter approval of rate settings. And, in any event, the evidence shows the District Board on 6-18-14 intended to retain Section A.9 of the April By Laws."

Specifically as to the fifth cause of action asserted only against Olson, the trial court concluded that she failed to make the threshold showing that the conduct complained of arose from protected activity. The trial court stated that, if anyone was engaged in a protected activity, it was Harrell who filed the claims. The trial court continued: "There is no other activity alleged in the 5th cause of action or stated in her declaration that could be construed as a 'protected' activity vis à vis [d]efendant Olson's activities regarding Mr. Harrell's claim."

In denying Harrell's special motion to strike, the trial court concluded that he made no threshold showing that his activities were protected.

The court continued: "Although the court finds that the threshold showing has failed, the court also finds that [d]efendants are not likely to prevail. . . . The Court agrees with [p]laintiff, that there is more than ample evidence, as pointed to above, both in [d]efendant Olson's own declaration and in the declaration of Hanson, that shows [p]laintiff has a reasonable probability of prevailing on the merits in this case."

DISCUSSION

I. Defendants' Contentions

Defendants assert numerous claims of error, but ultimately, they essentially contend that the trial court erred in denying their special motions to strike because they

demonstrated that the complained-of acts arose from protected activity and the District failed to demonstrate a probability of prevailing on the merits of its claims.

Defendants assert that the trial court failed to properly analyze the pleadings. Defendants insist that their legal arguments and the evidence they submitted was "ignored, or dismissed out of hand by the trial court, which failed to provide even rudimentary analysis of the claims and evidence below . . . ."

Defendants assert that the trial court's analysis of the first prong of the anti-SLAPP motion analysis—whether the allegations addressed conduct that arose from protected activity—was erroneous because it merely assumed the allegations did not involve protected activity and, further, the court seemed to believe that protected activity could not be at issue unless defendants were involved in a legislative hearing or proceeding and/or Board meetings, whereas section 425.16 is not so limited. Defendants assert that all relevant events and circumstances were matters of public interest and were public issues, and thus that they arose out of protected activity. Defendants also reprise the argument that their words and actions as alleged are immune from liability under the litigation privilege of Civil Code section 47.

Addressing the District's probability of prevailing on the merits, defendants assert that each cause of action failed to properly plead the required elements. They assert, among other things, that the allegations concerning damages were not supported by specific facts and admissible evidence. According to defendants, the "trial court's failure to substantially address these [pleading] issues was error, and prejudiced [defendants] in violation of the public policy that persons (and particularly public officers) not be subjected to such accusations without detailed pleading, so that they might properly defend themselves, and conduct reasonably targeted discovery during the pendency of the action." Additionally, defendants contend that the trial court did not determine that the District properly followed its own procedures so as to exhaust administrative remedies

before resorting to legal action.[12] Because the District failed to exhaust administrative remedies, defendants assert that the trial court lacked jurisdiction over the matter.[13]

II. Section 425.16 Special Motions to Strike and Applicable Legal Principles

" 'A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. " 'While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.' " ' " (*Sheley, supra*, 9 Cal.App.5th at pp. 1160-1161, quoting *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).)

" 'In 1992, out of concern over "a disturbing increase" in these types of lawsuits, the Legislature enacted section 425.16, the anti-SLAPP statute. (§ 425.16, subd. (a).) The statute authorized the filing of a special motion to strike to expedite the early dismissal of these unmeritorious claims. (§ 425.16, subds. (b)(1), (f).) To encourage "continued participation in matters of public significance" and to ensure "that this participation should not be chilled through abuse of the judicial process," the Legislature expressly provided that the anti-SLAPP statute "shall be construed broadly." (§ 425.16,

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[12] The exhaustion of administrative remedies raised by defendants—the filing of a grievance against a public employee—is necessarily premised on defendants' contention that they remained, at the relevant times, public officers or District employees.

[13] Defendants also assert in their reply brief that the District included "objectionable, derogatory, and needlessly inflammatory language sprinkled throughout the brief," and request that we "strike and disregard such language wherever it appears." We do not find in the District's brief language that is so objectionable, derogatory, or inflammatory so as to warrant striking or disregarding it.

subd. (a).)' " (*Sheley, supra*, 9 Cal.App.5th at p. 1161, quoting *Simpson, supra*, 49 Cal.4th at p. 21.)

"The anti-SLAPP statute 'provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity.' " (*Sheley, supra*, 9 Cal.App.5th at p. 1161, quoting *Baral, supra*, 1 Cal.5th at p. 384.) "The statute applies to 'cause[s] of action against a person *arising from any act of that person in furtherance of the person's right of petition or free speech* under the United States Constitution or the California Constitution in connection with a public issue.' " (*Sheley*, at p. 1161, quoting § 425.16, subd. (b)(1).) "As used in the statutory scheme, ' "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.' " (*Sheley*, at p. 1161, quoting § 425.16, subd. (e).)

"A special motion to strike involves a two-step process. 'First, the defendant must establish that the challenged claim arises from activity protected by section 425.16.' " (*Sheley, supra*, 9 Cal.App.5th at p. 1161, quoting *Baral, supra*, 1 Cal.5th at p. 384.) " '[H]owever, it is not enough to establish that the action was filed in response to or in retaliation for a party's exercise of the right to petition. [Citations.] Rather, the claim must be *based on* the protected petitioning activity.' " (*Sheley*, at pp. 1161-1162, quoting *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 804 (*Bergstein*); see *Navellier v. Sletten* (2003) 29 Cal.4th 82, 89 (*Navellier*).) " '[I]f the

defendant does not meet its burden on the first step, the court should deny the motion and need not address the second step.' " (*Sheley*, at p. 1162, quoting *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266 (*Tuszynska*); see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80-81 (*City of Cotati*).)

"Second, '[i]f the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.' " (*Sheley, supra*, 9 Cal.App.5th at p. 1162, quoting *Baral, supra*, 1 Cal.5th at p. 384.) "The plaintiff must do so with admissible evidence." (*Sheley*, at p. 1162, citing *Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 831.) " 'We decide this step of the analysis "on consideration of 'the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).) Looking at those affidavits, '[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff.' " ' " (*Sheley*, at p. 1162, quoting *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 378-379 (*Burrill*), disapproved in part in *Baral*, at p. 396, fn. 11.) "This second step has been described as a ' "summary-judgment-like procedure." ' " (*Sheley*, at p. 1162, quoting *Baral*, at p. 384.) "A court's second step 'inquiry is limited to whether the [opposing party] has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. [The court] . . . evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.' " (*Sheley*, at p. 1162, quoting *Baral*, at pp. 384-385.) " 'Only a [claim] that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' " (*Sheley*, at p. 1162, quoting *Navellier, supra*, 29 Cal.4th at p. 89.)

" 'On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action is a SLAPP, and if so, whether the plaintiff met its

evidentiary burden on the second step.' " (*Sheley, supra*, 9 Cal.App.5th, at p. 1162, quoting *Tuszynska, supra*, 199 Cal.App.4th at pp. 266-267.)

III. Analysis

A. First Cause of Action—Conversion

" ' " 'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages . . . ." ' " (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240, quoting *Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.)

In the first cause of action, the District stated that it deposited $61,555.08 into four accounts at Tri-Counties Bank in Yreka. The District asserted that, on or about June 25, 2014, without authorization from the Board, Olson took action which caused the bank to deliver to her four checks totaling $61,555.08 and caused the District's four accounts to be closed. The District further alleged that Olson took those funds into her personal possession and converted them to her own use, depriving the District of those funds. The District demanded the immediate return of the funds, but Olson refused to comply, and instead sent the funds out of state.

The District further alleged that defendants had possession of specified personal property owned by the District, and, despite the District's demands, they refused to return the property. Thus, the District asserted that defendants also converted personal property to their own use.

Additionally, the District asserted that defendants' failure to return the funds and the personal property constituted a violation of California's False Claims Act. (Gov. Code, § 12650 et seq.)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*).)

Defendants' conduct, by which the District in the first cause of action claims to have been injured is defendants' wrongful taking possession of money and personal property owned by the District, and their refusal to return, and retention of, that property following demands by the District. This conduct does not fall within one of the four categories described in section 425.16, subdivision (e), and thus does not arise from protected activity. This conduct is not a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1).) It is not a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (*Id.*, subd. (e)(2).) It is not a "written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (*Id.*, subd.

(e)(3).) Finally, obtaining and retention of money and personal property is not "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Id*., subd. (e)(4).)

A central premise of defendants' special motions to strike is that the District has commenced this action against them in retaliation for their petitioning activity in the form of litigation and administrative complaints. Defendants emphasize their position that this action is "part of an overarching goal of retaliating against them in employment for Olson and Harrell's filing of Brown Act complaints in the Superior Court, and for Olson's transmission of litigation information to the [District's] bank, which the Bank used as a reason to close the [District's] account," and that "such acts by [the District] [were] in violation of Olson and Harrell's rights to petition and /or free speech . . . ." Defendants assert that the fact that the conduct complained of constituted protected activity is "inherent given the actions by the [District] herein, the timing thereof in relation to Olson and Harrell's protected conduct prior to the filing of the herein action, the raising of these issues below, and evidence provided by Olson and Harrell in support." They further assert that this action "was all about Olson and Harrell's attempts (in both their individual, and official capacities) to lawfully petition the Courts, State administrative agencies, and the [District] itself, for relief of various grievances - including unsafe working conditions, and violations of law by some of its Board members (as well as violations of the [District's] own Bylaws), and the subsequent retaliatory acts by those Directors complained about, acting as [the District] herein." " '[H]owever, it is not enough to establish that the action was filed *in response to or in retaliation for a party's exercise of the right to petition*. [Citations.] Rather, the claim must be *based on* the protected petitioning activity.' " (*Sheley, supra*, 9 Cal.App.5th at pp. 1161-1162, first italics added, quoting *Bergstein, supra*, 236 Cal.App.4th at p. 804; see *Navellier, supra*, 29 Cal.4th at p. 89.) The first cause of action simply is not based on protected petitioning

activity; it is based on the wrongful taking and retention of District property, causing damages.

Defendants argue that the trial court failed to consider their contention that "the 'wrongful termination / adverse employment action in violation of public policy' theory [was] the basis for the suit being a SLAPP against them as public officers and employees . . . ." [14] (Fn. omitted.) However, the alleged wrongful termination/adverse employment action is not relevant to our analysis of the first prong on defendants' special motions to strike. Instead, in analyzing the first prong, our "focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' " (*Park, supra,* 2 Cal.5th at p. 1063.) The alleged wrongful termination or adverse employment action does not inform our determination as to whether defendants' alleged wrongful taking of and/or retaining money and personal property belonging to the District causing damages constituted protected activity within the meaning of section 425.16. While it is possible defendants' petitioning activity could have caused the District to *respond or retaliate* by commencing this action, this does not matter if the conduct complained of itself is not *based on* petitioning activity. As to the first cause of action, the claim does not arise out of

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[14] Defendants ask us to find that "the issue of retaliatory conduct in employment is a proper issue to raise in" an anti-SLAPP motion. Defendants represent that the "union of issue" where wrongful termination/adverse employment action/retaliation intersects with anti-SLAPP principles "has not yet been addressed by any court . . . ." Defendants also repeatedly assert, in effect, that Labor Code section 1102.5 pertaining to wrongful termination gives rise not only to an affirmative cause of action to be asserted in a lawsuit, but to an affirmative defense that may be asserted in an anti-SLAPP motion. Given the rule that " 'it is not enough to establish that the action was filed *in response to or in retaliation for a party's exercise of the right to petition*,' " and that instead " 'the claim must be *based on* the protected petitioning activity' " (*Sheley, supra,* 9 Cal.App.5th at pp. 1161-1162, first italics added, quoting *Bergstein, supra,* 236 Cal.App.4th at p. 804; see *Navellier, supra,* 29 Cal.4th at p. 89), we reject these arguments under the circumstances of this case.

petitioning activity within the meaning of section 425.16, subdivision (e), and it is not subject to a special motion to strike. (See *Sheley, supra*, 9 Cal.App.5th at pp. 1161-1162; *Bergstein, supra*, 236 Cal.App.4th at p. 804.)

Defendants expend great effort in arguing that a number of actions purportedly undertaken by the District, including rescinding previously effective bylaws, enacting new bylaws, commencing this action, and retaining its attorney, were not validly performed in accordance with the effective bylaws and provisions of law. However, in considering defendants' special motions to strike, the first prong requires us to determine whether defendants have established that the challenged claim arises from activity protected by section 425.16. (*Baral, supra*, 1 Cal.5th at p. 384; *Sheley, supra*, 9 Cal.App.5th at p. 1161.) Only if the defendant satisfies its burden on the first prong do we turn to the question of whether the plaintiff can demonstrate the merit of the claim by establishing a probability of prevailing. (*Baral*, at p. 384; *Sheley*, at p. 1162.) While these arguments proffered by defendants may be potentially relevant to the second step of the analysis, they are not relevant to the first. Because we conclude that defendants did not satisfy their burden with respect to the first step of the anti-SLAPP analysis as to the first cause of action, we do not consider whether the District demonstrated a probability of prevailing on the merits. (See *Sheley, supra*, 9 Cal.App.5th at p. 1162; *Tuszynska, supra*, 199 Cal.App.4th at p. 266; see also *City of Cotati, supra*, 29 Cal.4th at pp. 80-81.)

We conclude that the trial court properly denied defendants' special motions to strike as to the first cause of action.

B. Second Cause of Action—Injunctive Relief/Possession of District Property

In the second cause of action, seeking preliminary and permanent injunctive relief, the District reasserted the allegations of the first cause of action, and asserted that, unless restrained, defendants would continue to perpetrate wrongful acts and omissions causing the District irreparable damages. The District sought preliminary and permanent

injunctions prohibiting defendants from "taking and/or maintaining unauthorized possession of property of the" District.

The relief sought by the District in the second cause of action is different than the relief sought in the first cause of action. The showing the District must make is also different. What is not different between the first and second causes of action is " 'the defendant[s'] activity . . . that gives rise to [their] asserted liability,' " or, in other words, "*the defendant*[*s'*] *conduct by which* [*the District*] *claims to have been injured*," " 'and whether that activity constitutes protected speech or petitioning.' " (*Park, supra*, 2 Cal.5th at p. 1063.)

Thus, our conclusion in part III.A. of the discussion, *ante*, applies equally to the second cause of action, as it is premised on the same underlying conduct. And because defendants did not satisfy their burden as to the first step of the anti-SLAPP analysis, we do not consider whether the District demonstrated a probability of prevailing on the merits of the second cause of action. (See *Sheley, supra*, 9 Cal.App.5th at p. 1162; *Tuszynska*, *supra*, 199 Cal.App.4th at p. 266; see also *City of Cotati*, *supra*, 29 Cal.4th at pp. 80-81.)

We conclude that the trial court properly denied defendants' special motions to strike as to the second cause of action.

C. Third Cause of Action—Injunctive Relief/False Representations

In the third cause of action, the District stated that, on or about June 18, 2014, the Board dismissed Olson as secretary and dismissed Harrell as volunteer general manager, and replacements were appointed to those positions. The District asserted that, notwithstanding their dismissals, defendants continued to represent themselves as holding their former positions with the District, and they attempted to exercise the authority of those positions. Purporting to act in his position as general manager, Harrell trespassed on District property, changed locks, and took other unauthorized acts. The District asserted that defendants had interfered with District functions and caused the District

damages. The District asserted that, unless defendants were restrained, they would continue to do so.

The District requested preliminary and permanent injunctive relief, enjoining defendants from making representations to third parties that they hold positions or offices with the District, and from exercising or attempting to exercise the authority of such offices, with the exception that Olson could continue to represent that she was once a member of the Board. The District also sought preliminary and permanent relief specifically enjoining Harrell from entering on District property, changing locks on District property, and modifying or removing District personal property.

This conduct, in part, could be deemed a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" (§ 425.16, subd. (e)(1)) or a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" (*id*., subd. (e)(2)). Insofar as Olson's conduct as alleged consisted of representing herself as secretary in court and/or administrative proceedings, presumably those that took place before the Labor Commissioner, and certifying District records and testifying, her conduct arose from protected activity within the meaning of section 425.16, subdivision (e)(1) and (2). Defendants' actions before the Labor Commissioner also constitute conduct in furtherance of the exercise of the constitutional right of petition. (*Ibid*.)

Additionally, this conduct could amount to the exercise of the constitutional right to free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e)(4).) Defendants allegedly represented to third parties that they held positions with a community services district. Through those positions they claimed to hold, defendants attempted to exercise the authority vested in them pursuant to those positions, including, apparently, matters related to District elections. Thus, their conduct of which

the District complains involved speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e)(4).)

The District asserts that the speech at issue constitutes criminal conduct, suggesting that therefore it would not be protected free speech. If it is true that defendants *falsely* represented that they still held their former positions, the District may be correct. (See Pen. Code, §§ 529 & 530;[15] see generally *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134, citing *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 628 [82 L.Ed.2d 462, 478] [discussing the fact that the right to free speech is not absolute and that a "statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity"]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 628 [the right of free speech is not absolute, and prohibiting speech which is likely to constitute a breach of the peace is constitutionally allowable].)

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[15] Penal code section 529 makes the following conduct a misdemeanor: "(a) Every person who falsely personates another in either his or her private or official capacity, and in that assumed character does any of the following, is punishable pursuant to subdivision (b): [¶] (1) Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take that bail or surety; [¶] (2) Verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, or used as true; [¶] (3) Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person." Penal Code section 530 defines a form of larceny and provides: "Every person who falsely personates another, in either his private or official capacity, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person, or to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received."

However, in the first step of the anti-SLAPP analysis, we cannot assume that defendants are falsely representing themselves just because the District alleges as much. "Mere allegations that defendants acted illegally . . . do not render the anti-SLAPP statute inapplicable. For instance, the First Amendment does not protect defamation, yet defamation suits are a prime target of anti-SLAPP motions. [Citation.] 'The Legislature did not intend that . . . to invoke the special motion to strike the defendant must first establish her [or his] actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous.' " (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1245-1246 (*Huntingdon Life Sciences*), quoting *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305.) "When a cause of action arises from constitutionally protected speech, section 425.16 applies and the question of whether the speech is false must be examined when plaintiff demonstrates a probability of success on the merits." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 420 (*Scott*).) However, "[i]f the defendant *concedes* or the evidence *conclusively establishes* the conduct complained of was illegal, as a matter of law the defendant cannot make a prima facie showing the action arises from protected activity within the meaning of section 425.16." (*Huntingdon Life Sciences*, at p. 1246; accord *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*).)

Here, defendants certainly do not concede that the conduct complained of was illegal. Indeed, a principal focus of their arguments is that they were at all times acting lawfully under federal and state law and under the District's bylaws. Further, we conclude that the evidence does not conclusively establish, for purposes of defendants' special motions to strike, that their conduct was a violation of Penal Code section 529 (see fn. 15, *ante*) or otherwise illegal.

We conclude that defendants satisfied their burden of demonstrating that the conduct complained of in the third cause of action, at least in part,[16] arose from protected activity. Therefore, we proceed to the second step in the analysis, whether the District demonstrated a probability of prevailing on the merits of the claim. (See *Baral, supra*, 1 Cal.5th at p. 384; *Sheley, supra*, 9 Cal.App.5th at p. 1162.)

"The elements of a cause of action for intentional misrepresentation are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) actual and justifiable reliance, and (5) resulting damage." (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166 (*Daniels*).)[17]

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[16] Defendants' alleged acts in attempting to exercise the authority of their former offices, such as by trespassing on District property, changing locks, and undertaking other unauthorized acts, do not constitute the exercise of free speech or otherwise protected activity. Thus, the third cause of action is a " 'mixed cause of action' that combines allegations of activity protected by the statute with allegations of unprotected activity." (*Baral, supra*, 1 Cal.5th at p. 381.) Under *Baral*, claims within a single cause of action alleging unprotected activity such as these are "disregarded at this stage" while the allegations concerning protected activity may be struck, depending on the plaintiff's ability to prove a probability of prevailing on the merits of the claims in the second step of the analysis. (*Id.* at p. 396.)

[17] The language of the second amended complaint does not make it explicitly clear that the third cause of action is based on intentional misrepresentation as opposed to, for example, negligent misrepresentation. However, in opposing defendants' special motions to strike, the District represented that the third cause of action "state[s] a cause of action for intentional misrepresentation." In any event, inasmuch as the third cause of action could be deemed one sounding in negligent misrepresentation, the District would only have to prove that the misrepresentation was made in the absence of reasonable grounds for believing it to be true rather than requiring actual knowledge of its falsity. (*Daniels, supra*, 246 Cal.App.4th at p. 1166.) Thus, if the District can satisfy its burden on the second step of our anti-SLAPP analysis as to a cause of action for intentional misrepresentation, it could certainly establish its burden as to a negligent misrepresentation cause of action.

In her declaration, Hanson stated that Harrell was the volunteer acting general manager until approximately June 18, 2014, and Olson was secretary until approximately June 25, 2014.[18] Nonetheless, according to Hanson, despite having been removed as secretary and having a replacement appointed, and despite Board objections, Olson continued to represent herself as secretary. She did this in certifying records of the District, testifying in court and administrative proceedings, directing District employees, and corresponding with governmental agencies. Hanson stated that the most recent such misrepresentation occurred on March 3, 2015, when Olson represented herself as secretary to the Siskiyou county clerk, causing the clerk to send Olson District election materials. Hanson asserted that Olson's misrepresentations had caused the District to incur significant unnecessary expenses and had sowed confusion. Hanson believed that, unless enjoined, Olson would continue to make such false representations, as she had maintained for the prior nine months that she had the legal right to represent herself as secretary.

Hanson stated that Harrell had similarly misrepresented himself as being acting general manager after he was removed from that office. According to Hanson, Harrell had given instructions to District employees, including Clint Dingman, giving them the false impression that he had authority imparted by the District and that he spoke for the District. Hanson further alleged that Harrell had entered onto District property and had changed locks, removed water meters, and taken other unauthorized actions.

The minutes of the June 18, 2014, special meeting of the Board, and contemporaneous resolutions, state that the bylaws adopted on April 18, 2014, were rescinded. That resolution further stated: "All officers to be eliminated as well pending adoption of new bylaws." In a resolution dated January 7, 2015, the District reaffirmed,

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[18] The second amended complaint alleges that Olson was dismissed as secretary on or about June 18, 2014.

among other things, the removal of Olson and Harrell from their positions, and directed them to cease taking actions purportedly pursuant to their positions with the District.

Additionally, the District submitted an e-mail exchange between Olson and Colleen Setzer, Siskiyou County Clerk, on March 3, 2015, concerning matters related to the District election.

An hour, mileage, and expenses claim for Harrell was signed by Olson, purportedly as secretary, on November 29, 2014. The District also submitted the December 18, 2014, order, decision or award of the Labor Commissioner, concluding that, during the period from March 9, 2014, through November 30, 2014, Harrell was a volunteer, not an employee, and was due nothing on his wage claim.

We conclude that, through the evidence the District submitted, it established that it stated a legally sufficient claim, and made a prima facie factual showing sufficient to sustain a favorable judgment, for intentional misrepresentation. (See generally *Baral, supra*, 1 Cal.5th at pp. 384-385; *Sheley, supra*, 9 Cal.App.5th at p. 1162.) Accepting as true all evidence in favor of the District (see *Sheley*, at p. 1162; *Burrill, supra*, 217 Cal.App.4th at pp. 378-379), the pleading and the evidence submitted by the District establish that Olson and Harrell made the misrepresentation that they still held their positions with the District after they were dismissed; they knew the falsity of the misrepresentation because they knew they had been dismissed and the District had subsequently demanded that they stop representing themselves as holding their former positions; they intended to induce reliance on their misrepresentations, as they intended various individuals, including the Labor Commissioner, District employees, and the Siskiyou County Clerk, to rely on these representations and as a result to take particular action; in at least some cases, actual and justifiable reliance resulted; and, as a result, the District sustained damages, including unnecessary legal expense. (See generally *Daniels, supra*, 246 Cal.App.4th at p. 1166.)

We further conclude that the evidence submitted by defendants does not defeat the District's claim as a matter of law. (See generally *Baral, supra*, 1 Cal.5th at pp. 384-385; *Sheley, supra*, 9 cal.App.5th at p. 1162.) On this record, defendants have not established, as a matter of law, that the action taken by the District in, among other things, removing defendants from their positions was unlawful, unauthorized under District bylaws, and constituted void acts. Nor have defendants established, as a matter of law, that they had immunity under the Government Code as public officials (see Gov. Code, §§ 820.2, 821.6, 822.2), or that the District was required, and failed, to exhaust administrative remedies as a result of defendants' status as public officials. On this record, for present purposes, the District established that, at the relevant times, defendants were not public officials. Further, defendants did not establish, as a matter of law, that their actions were privileged under the litigation privilege of Civil Code section 47, subdivision (b), which we discuss in greater detail in part III.E. of the Discussion, *post*.

Relevant to the specific relief sought in the third cause of action, "as a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554 (*White*).) We have determined that the District demonstrated a probability of prevailing on the merits of its claim within the meaning of the anti-SLAPP analysis. For the same reasons, we conclude that the District has demonstrated a likelihood of prevailing on the merits for purposes of considering its entitlement to injunctive relief. We further conclude that a balancing of the harm to the District if the relief it seeks is denied as against the harm to defendants if the relief is granted favors the District. Thus, we conclude that the District has

established the probability of prevailing on the third cause of action both substantively and in terms of the specific relief sought.[19]

We conclude that the trial court properly denied defendants' special motions to strike as to the third cause of action.

D. Fourth Cause of Action—Injunctive Relief/Trespass to Personal Property

In the fourth cause of action, the District asserted that "[o]n or about June 12, 2014, and June 17, 2014, without the direction or authorization of plaintiff District, and without any other authority under law, defendant Olson defaced official and legally required notices of meetings of the board of directors of plaintiff District, which notices had been prepared and posted by the Board President of plaintiff District. If not restrained, Olson will continue to do so." (Capitalization omitted.) Therefore, the District requested "preliminary and permanent injunctions against defendant Olson prohibiting her, personally and through or by any other persons, from defacing, writing upon, removing, damaging, or covering any official notices of plaintiff District." (Capitalization omitted.)

We conclude that Olson's actions alleged under the fourth cause of action arise from protected activity. Olson made written statements, albeit by defacing the District notices, and those statements, regarding a public meeting of the District, appear to have been made "in a place open to the public or a public forum in connection with an issue of

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[19] "A permanent injunction is an equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate. A permanent injunction is not issued to maintain the status quo but is a final judgment on the merits." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.) Inasmuch as we have determined that the District demonstrated a probability of prevailing on the merits of the substantive claim, we further conclude that it demonstrated a probability of prevailing in seeking permanent injunctive relief.

public interest." (§ 425.16, subd. (e)(3).) The statements also appear to be made in furtherance of the constitutional right of free speech "in connection with a public issue or an issue of public interest." (*Id.*, subd. (e)(4).)

The District asserts that Olson may have had the right to post her own notices, decrying the meetings as illegal and in violation of District bylaws and the Brown Act. However, the District asserts that Olson did not have the right to deface District notices, the posting of which was required by law.[20] The District further asserts that Olson's defacement of the District notices was a crime, and that criminal conduct is not protected activity.

Olson's conduct may constitute vandalism. (See Pen. Code, § 594.)[21] As the court in *Huntingdon Life Sciences* stated, "Vandalism, of course, is not a legitimate exercise of free speech rights, and if the complaint arose only from such conduct it would not be subject to an anti-SLAPP motion." (*Huntingdon Life Sciences, supra*, 129 Cal.App.4th at p. 1245.) As the District asserts, Olson's conduct also may constitute a violation of Government Code section 6200[22] and 6201.[23] However, as stated *ante*,

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[20] Government Code section 54954.2, part of the Brown Act, requires the posting of an agenda before regular meetings, and is applicable to water districts. (See, e.g., *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196.)

[21] Penal Code section 594 provides, in part, that every person who maliciously defaces with graffiti or other inscribed material, damages, or destroys real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism. (Pen. Code, § 594, subd. (a).)

[22] Government Code section 6200 provides: "Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following: [¶] (a) Steal, remove, or secrete. [¶] (b) Destroy, mutilate, or deface. [¶] (c) Alter or falsify."

"[m]ere allegations that defendants acted illegally . . . do not render the anti-SLAPP statute inapplicable." (*Huntingdon Life Sciences*, at pp. 1245-1246.) "If the defendant *concedes* or the evidence *conclusively establishes* the conduct complained of was illegal, as a matter of law the defendant cannot make a prima facie showing the action arises from protected activity within the meaning of section 425.16." (*Huntingdon Life Sciences*, at p. 1246.) However, while Olson concedes that she wrote on the notices, she does not concede the she vandalized the notices, committed violations of the Government Code in writing on them, or that her actions otherwise were illegal. Moreover, this record does not conclusively establish that Olson's conduct in writing on the notices was illegal. Therefore, we shall turn to the second step of the anti-SLAPP analysis and consider whether the District established the probability of prevailing on the merits of the claim.

A cause of action for trespass to chattel may lie where the plaintiff can demonstrate an intentional interference with the possession or use of the plaintiff's personal property proximately causing injury. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566-1567 (*Thrifty-Tel, Inc.*).) The subject notices, while posted on bulletin boards, were the property of the District. Olson acknowledges that she wrote on the notices, copies of which appear in the record. In her declaration, Hanson stated that Olson's actions in defacing the notices were undertaken without authorization from the District or its officers. The District is not seeking damages, but rather is seeking to enjoin Olson from defacing District notices in the future, although the District has sustained injury in the form of interference with its public meetings caused by Olson's defacing of the legally required notices.

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23 Government Code section 6201 provides: "Every person not an officer referred to in Section 6200, who is guilty of any of the acts specified in that section, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars ($1,000), or by both that fine and imprisonment."

Thus, the District's pleading and the evidence demonstrate Olson's intentional interference with the possession or use of the District's personal property proximately causing injury. (See generally *Thrifty-Tel, Inc., supra*, 46 Cal.App.4th at pp. 1566-1567.) We conclude that the District has established the probability of prevailing on its fourth cause of action by stating a legally sufficient claim and making a prima facie factual showing sufficient to sustain a favorable judgment. (See generally *Baral, supra*, 1 Cal.5th at pp. 384-385; *Sheley, supra*, 9 Cal.App.5th at p. 1162.) Moreover, we conclude that Olson did not defeat the District's claim as a matter of law. It does appear that Olson had not been removed as secretary at the time she defaced the notices; she apparently wrote on the notices on June 12 and 17, 2014, and, according to Hanson, she was not removed as secretary until approximately June 25, 2014. However, this does not establish a defense to this cause of action as a matter of law. On this record, Olson did not establish, as a matter of law, that, for example, she had the District's authorization as secretary to deface the notices (or make the representations she made on them).

Again, turning to the District's burden in seeking preliminary injunctive relief (see generally *White, supra*, 30 Cal.4th at p. 554), we conclude that the District established the likelihood that it will prevail on the merits of its claim for the same reasons as those discussed, *ante*. The harm to Olson if the relief is granted is that she will be precluded from defacing, writing on, removing, damaging, or covering District notices. The harm the District will suffer if such relief is denied is that Olson will continue to interfere with District public notices that are required by law. Balancing these harms favors the District.[24]

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[24] For the same reason as set forth in footnote 19, *ante*, because we have concluded that the District demonstrated a probability of prevailing on the merits of its substantive claim, we further conclude that it demonstrated a probability of prevailing in seeking permanent injunctive relief.

Because we conclude that Olson did not make a sufficient showing to defeat the District's claim as a matter of law, we further conclude that the trial court properly denied Olson's special motion to strike as to the fourth cause of action.

E. Fifth Cause of Action—Breach of Fiduciary Duty

In the fifth cause of action, the District asserted that Olson was a member of the Board, and, as such, she owed a fiduciary duty to the District. According to the District, on or about December 1, 2014, Olson breached her fiduciary duty to the District "by providing assistance to . . . Harrell with a false and fraudulent claim he made, and a lawsuit he filed thereon, against the District, seeking unpaid wages." (Capitalization omitted.)

We have no difficulty in concluding that the fifth cause of action arises out of protected activity within the meaning of section 425.16. The conduct complained of plainly relates to Olson's statements and actions in assisting Harrell with litigation and in a proceeding before the Labor Commissioner for unpaid wages. Therefore, this conduct, at least in part, was conduct described in section 425.16, subdivision (e)(1), (2), and (4). We therefore proceed to consider whether the District demonstrated a probability of prevailing on the merits of the claim. (See *Baral, supra,* 1 Cal.5th at p. 384; *Sheley, supra,* 9 Cal.App.5th at p. 1162.)

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary relationship; (2) breach of fiduciary duty; and (3) damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820-821.)

While the parties disagree as to whether Olson, at the relevant times, was still serving as secretary for the District, they do agree that, at those times, she remained a member of the Board. We conclude that the Board members owed a fiduciary duty to the District by undertaking to act on behalf of and for the benefit of the District. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 221; Cf. *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513 [directors of

nonprofit corporations, such as a homeowners' association, are fiduciaries whose relationship is governed by a standard requiring them to exercise undivided loyalty for the interests of the corporation].) Therefore, we proceed to consider breach and damages.

The District asserted that Olson breached her fiduciary duty to the District "by providing assistance to . . . Harrell with a false and fraudulent claim he made, and a lawsuit he filed thereon, against the [District] seeking unpaid wages. Such assistance was voluntarily given and was neither required of her as a member of the . . . board . . . , nor an exercise of her right of free speech." The District alleged that Harrell's claim was determined to be without merit. According to the District, as a result of Olson's breach of her fiduciary duty to the District, it suffered damages in an amount to be proven at trial.

These allegations were amplified by the evidence submitted by the District in opposition to the special motions to strike. In her declaration, Hanson stated that Olson had worked closely with Harrell in his wage claim against the District. Among other things, Olson furnished Harrell with District records and falsely certified records in her purported capacity as secretary. Hanson stated that she was present at the proceeding before the Labor Commissioner when those records, which the District had not had access to since Olson was replaced as secretary, were authenticated by Olson and offered into evidence in support of Harrell's claim against the District. Hanson asserted that, because Olson had possession and control of District personal property, including office equipment, it was "reasonable to infer" that Olson used that property in furtherance of Harrell's lawsuits and claims against the District. Olson's actions caused the District to incur legal expenses it would not otherwise have had.

Accepting as true all evidence in favor of the District (see *Sheley, supra*, 9 Cal.App.5th at p. 1162; *Burrill, supra,* 217 Cal.App.4th at pp. 378-379), we conclude that the allegations in the second amended complaint and the statements in Hanson's declaration " 'stated a legally sufficient claim and made a prima facie factual showing

sufficient to sustain a favorable judgment' " (*Baral, supra*, 1 Cal.5th at pp. 384-385; *Sheley*, at p. 1162) that Olson breached her fiduciary duty to the District by: giving Harrell records improperly in her possession; falsely certifying and/or authenticating records by fraudulently posing as secretary, an office she no longer occupied; and using District office equipment to aid Harrell in his case against the District. These actions by Olson, according to Hanson, caused the District to incur legal expenses in its defense against Harrell's claim that it otherwise would not have incurred. We conclude that the District made a sufficient showing of a probability of prevailing on the merits of the fifth cause of action to withstand Olson's special motion to strike.

We further conclude that Olson's showing did not defeat the District's claim as a matter of law. (See *Baral, supra*, 1 Cal.5th at pp. 384-385; *Sheley, supra*, 9 Cal.App.5th at p. 1162.) Olson largely relies on the litigation privilege under Civil Code section 47, subdivision (b). Civil Code section 47, subdivision (b)(2) and (3), provides that a privileged publication or broadcast is one made in any judicial proceeding or in any other official proceeding authorized by law. "[T]he privilege is 'an "absolute" privilege, and it bars all tort causes of action except a claim of malicious prosecution.' " (*Flatley, supra*, 39 Cal.4th at p. 322.) "The privilege does not apply unless the statements were made in an anticipation of an official proceeding or during an official proceeding." (*Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 90 (*Bikkina*).) "Many cases have explained that [Civil Code] section 47(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit." (*Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 361.) "The litigation privilege is . . . relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." (*Flatley*, at p. 323.)

Olson's conduct that is the subject of the fifth cause of action is, at least for the most part, not a publication or broadcast or other statement made in a judicial proceeding or other proceeding authorized by law. (See Civ. Code, § 47, subd. (b)(2), (3); see also *Flatley, supra*, 39 Cal.4th at p. 322.) The conduct complained of described in Hanson's declaration includes Olson's acts in wrongfully retaining District records and providing them to Harrell and assisting Harrell through the use of District office equipment not properly in her possession. These are not privileged statements in a judicial proceeding or other proceeding authorized by law. (See Civ. Code, § 47, subd. (b)(2)-(3).) As Olson asserts, it may be the case that even some forms of illegal conduct may be absolutely privileged. (See *Flatley*, at pp. 324, 325 ["[t]he litigation privilege embodied in Civil Code section 47, subdivision (b) serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth. Applying the litigation privilege to some forms of unlawful litigation-related activity may advance those broad goals notwithstanding the 'occasional unfair result' in an individual case"].) While this may be true, the subject statements must satisfy the statutory requirements of Civil Code section 47 for the litigation privilege to apply. With the possible exception of authenticating District records and testifying, the conduct complained of does not constitute communications made in a judicial proceeding or other proceeding authorized by law. (See Civ. Code, § 47, subd. (b)(2)-(3); see also *Flatley*, at p. 324, italics added [the Civ. Code, § 47 litigation privilege "enshrines a substantive rule of law that grants absolute immunity from tort liability *for communications made in relation to judicial proceedings* . . . ."].)

We note here that, if the more specific allegations in Hanson's declaration appeared in the second amended complaint, we might strike those portions of the fifth cause of action that alleged Olson assisted Harrell by "falsely certifying some [District] records for [Harrell]," and that, in the proceeding before the Labor Commissioner, those

records "were authenticated by [Olson] and offered into evidence in support of [Harrell's] claim." These factual allegations not only allege conduct arising out of protected activity for purposes of the first step of the anti-SLAPP analysis, but further could constitute a publication or broadcast made in any judicial proceeding or in any other official proceeding authorized by law. (See Civ. Code, § 47, subd. (b)(2), (3); see also *Flatley, supra*, 39 Cal.4th at p. 322.) Thus, were these specific allegations in Hanson's declaration contained within the second amended complaint, we might deem the fifth cause of action to be a "mixed claim" and, under the authority of *Baral, supra*, 1 Cal.5th 376, strike those portions of the fifth cause of action that alleged Olson breached her fiduciary duty to the District by authenticating District records and causing them to be offered into evidence in the proceeding before the Labor Commissioner because, based on invocation of the privilege of Civil Code section 47, subdivision (b), the District could not demonstrate the probability of prevailing on the claim insofar as it was based on that allegation. However, these specific allegations *are not* in the second amended complaint, and there is nothing to parse as part of a mixed claim in this manner. The true substance of the fifth cause of action as set forth in the second amended complaint is that Olson breached her fiduciary duty to the District "by *providing assistance* to . . . Harrell with a false and fraudulent claim he made, and a lawsuit he filed thereon, against the [District], seeking unpaid wages." (Italics added.) Accepting as true all evidence in favor of the District (see *Sheley, supra*, 9 Cal.App.5th at p. 1162; *Burrill, supra*, 217 Cal.App.4th at pp. 378-379), the District has demonstrated the probability of prevailing on this claim based, inter alia, on some, but not all, of the conduct described in Hanson's declaration, including Olson's alleged conduct in giving Harrell records improperly in her possession and using District office equipment to aid Harrell in his case against the District. As to these allegations, Olson could not defeat the District's claim as a matter of law based on Civil Code section 47, subdivision (b) because this conduct did not amount to a publication or broadcast made in any judicial proceeding or in any other official

proceeding authorized by law. (See Civ. Code, § 47, subd. (b)(2), (3); see also *Flatley*, at p. 322.)

We conclude that the District made a sufficient showing of its probability of prevailing on the merits so as to warrant denying Olson's special motion to strike the fifth cause of action.

F. Conclusion

As to all five causes of action, we have concluded either that the conduct complained of did not arise out of protected activity, or if it did, the District demonstrated a probability of prevailing on the merits of its claims and defendants' showings did not defeat the District's claims as a matter of law. (See generally *Baral, supra*, 1 Cal.5th at pp. 384-385; *Sheley, supra*, 9 Cal.App.5th at p. 1161-1162.) Therefore, we affirm the trial court's denial of defendants' special motions to strike, albeit in some instances on different grounds than those relied upon by the trial court. (E.g., *Medical Marijuana, Inc. v. ProjectCBD.com* (2016) 6 Cal.App.5th 602, 606 [affirming trial court's denial of special motion to strike two causes of action, albeit on grounds different from those relied upon by the trial court].)

DISPOSITION

The judgment (order) is affirmed. Costs are awarded to respondent. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

/s/
MURRAY, J.

We concur:

/s/,
ROBIE, Acting P. J.

/s/
BUTZ, J.